HERBERT M. COLE ET AL.

IBLA 89-243 Decided July 26, 1990

Appeal from a decision of the Arizona State Office, Bureau of Land Management, notifying claimants of service charge deficiency. A MC 291915 et al.

Affirmed in part, set aside in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices of Location--Federal Land Policy and Management Act of 1976: Service Charges--Mining Claims: Recordation of Certificate or Notice of Location

Regulation 43 CFR 3833.1-3(b), which increased the service charge to $10 for recording a notice of location with BLM, was effective Jan. 3, 1989. Notices of location mailed on Dec. 31, 1988, received by BLM on Jan. 4, 1989, and accompanied by a $5 service charge per claim are properly rejected by BLM upon expiration of a 30-day compliance period authorized by 43 CFR 3833.1-4(a) without payment of a $5 balance per claim. At the conclusion of the 30-day compliance period, an appeals period of 30 days commences.

Instruction Memorandum No. 89-222 (Jan. 18, 1989) directs BLM to indicate, in its interlocutory decisions giving notice of deficient fees, that the agency will apply the submitted fees to process the claims in the order listed on the document submitted by the owner.

APPEARANCES: Herbert M. Cole, Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Herbert M. Cole et al. 1/ have appealed from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated January 6, 1989, notifying appellants that they had enclosed insufficient service charges

1/ In addition to Cole, appellants are Eugene A. Cole, Katherine A. Cole, France House, Charles House, E. Kent Hopper, Hank Vlieg, Cynthia J. Buchanan, and Companies West Group, Inc., a.k.a. CWG.

when submitting 90 mining claim location notices to the State Office for recordation. 2/ BLM's decision stated that appellants' location notices "shall be noted as being recorded on the date received provided that the claimant submits the proper service charge within 30 days of receipt of [this] deficiency notice." BLM further stated that appellants' failure to submit the proper service charge shall cause the filing to be rejected and returned.

In support of its decision, BLM cited to newly revised regulations, effective January 3, 1989, calling for increased recordation fees. The relevant regulation, 43 CFR 3833.1-3(b), provided: "Each mining claim, millsite, or tunnel site filed for recordation shall be accompanied by a nonrefundable service charge of $10.00." (Emphasis added.)

Appellants do not dispute that the applicable regulation has been changed, but they contend that their filings were made before the effective date (Jan. 3, 1989) of the regulation. In support, appellants enclose with their pleadings a photocopy of certified mail receipt P 068 554 840 bearing the date stamp ("December 31, 1988") of the Denver Postal Service. Appel-lants also enclose a photocopy of a return receipt card indicating delivery of certified letter P 068 554 840 to the Arizona State Office on January 4, 1989.

Before turning to the substance of the appeal, we must address a procedural issue. BLM's decision, although captioned "Filing Rejected Subject to Compliance," was interlocutory in nature, i.e., not final for purposes of appeal. Examining the terms of the decision, we note that BLM did not, in fact, reject appellants' notices, but rather it provided that rejection would occur upon appellants' failure to cure the service charge deficiency.

BLM's handling of appellants' deficiency payment was consistent with newly promulgated 43 CFR 3833.1-4(a), which states:

> (a) Prior to January 1, 1991. Filings that are not accom-panied by the service charges set forth in § 3833.1-3 of this title shall be noted as being recorded on the date received provided that the claimant submits the proper service charge within 30 days of receipt of such deficiency notice by the authorized officer. Failure to submit the proper service charge shall cause the filing to be rejected and returned to the claimant/owner. [Emphasis added.]

2/ The case file contains a copy of another decision issued Jan. 6, 1989. In that decision, BLM declared four of the claims at issue (CWG Nos. 255, 256, 265, and 266; A MC 291969, A MC 291970, A MC 291979, and A MC 291980) null and void ab initio because the United States did not own the mineral interest in the land where the claims were located. This decision was received Jan. 11, 1989, but the record does not reflect that appellants filed a notice of appeal of the decision. If no appeal has been filed, then the decision would be final, and those claims are null and void.

BLM erred, however, in stating that an appeal of its January 6, 1989, decision was presently available to appellants. Final BLM decisions are
appealable to this Board, but BLM's January 6, 1989, decision was, in effect, an interim determination that offered appellants the chance to cure a perceived deficiency prior to rejection. Carl Gerard, 70 IBLA 343, 346 (1983). BLM's decision did not become final until expiration of the 30-day compliance (cure) period without submission of additional fees. Randall J. Gerlach, 90 IBLA 338, 339 (1986). A 30-day appeals period commenced upon expiration of appellants' 30-day compliance period. Id. 3/

Upon receipt of BLM's January 6, 1989, decision, appellants could have complied with BLM's request for additional service charges, complied under protest, or awaited the running of the 30-day compliance period and appealed the final rejection of their location notices. Carl Gerard, 70 IBLA at 346. The "appeal" filed by appellants on February 9, 1989, was, in fact, an objection to an action proposed to be taken by BLM (rejection had not yet occurred) under 43 CFR 4.450-2, and BLM should have treated it as a protest. See Goldie Skodras, 72 IBLA 120 (1983).

It would be appropriate at this time to dismiss the instant "appeal" as premature and remand the record to BLM for its consideration of appellants' protest arguments. Such a course of action would likely be in vain, however, because based on the record BLM would have no alternative but to charge appellants $10 per claim, and thus the dispute would be before the Board again. Robert C. LeFaivre, 95 IBLA 26, 28 (1986). As we have stated, the Board will adjudicate an appeal where a remand to BLM would serve no useful purpose. Beard Oil Co., 97 IBLA 66 (1987). We will, therefore, address the merits of appellants' pleadings.

The gist of appellants' argument is the contention that the notices of location should be deemed to be delivered to BLM on the date these materials were "placed" with the Postal Service. Appellants acknowledge that their argument is based upon "the Rules and Regulations governing the Internal Revenue Service [wherein] placement of any returns WITH THE UNITED STATES POSTAL SERVICE is deemed placement with the Internal Revenue Service." (Emphasis in original.)

[1] Appellants' argument overlooks 43 CFR 3833.0-5(m), which sets forth this Department's longstanding definition of the operative word "filed," as used at 43 CFR 3833.1-3(b). Regulation 43 CFR 3833.0-5(m)

3/ Having granted appellants a 30-day compliance period in accordance with 43 CFR 3833.1-4(a), BLM contradicted this action by stating that its Jan. 6, 1989, decision was final for the Department. It further erred in stating that all claims would be voided if appellants did not remit the amount due, appeal, or drop claims during the 30-day compliance period. As explained infra, appellants could sit out the compliance period, which ended Feb. 10, 1989, and thereafter appeal during the 30-day appeal period that commenced upon expiration of the compliance period. BLM's characterization of its decision as final is not controlling, James M. Chudnow, 89 IBLA 361, 364 n.3 (1985), and must be modified in the future.

provides in part: "'Filed or file' means being received and date stamped by the proper BLM office." 4/ Elsewhere at 43 CFR 1821.2-2(f), Departmental regulations provide: "Except when paragraph (c) of this section is applicable, [5/] filing is accomplished when a document is delivered to and received by the proper office. Depositing a document in the mails does not constitute filing." (Emphasis added.)

The definition of "filing" utilized by the Internal Revenue Service is different from that operative within the Department of the Interior, and neither BLM nor the Board is free to ignore duly promulgated regulations of this Department, such as those quoted above. Exxon Co., U.S.A., 45 IBLA 313 (1980). The applicable regulations of the Department reject the definition of filing acceptable at the Internal Revenue Service and cause us to find that appellants' notices of location were filed on the day they were received and date stamped by the Arizona State Office, i.e., on January 4, 1989.

When these notices of location were filed for recordation on January 4, 1989, newly revised 43 CFR 3833.1-3(b) was in effect. Appellants were, therefore, required to enclose $10 for each of their 90 notices of location. BLM correctly held that appellants' submission of $5 per claim (the old rate) was inadequate.

We note that during the compliance period immediately following appel-lants' receipt of BLM's January 6, 1989, decision, BLM issued Instruction Memorandum (I.M.) No. 89-222 (Jan. 18, 1989). This document sets forth a change in the policy applied by the Arizona State Office in the instant case. The I.M. states:

> For deficient fee situations, your interlocutory decision calling for the remaining fees must state clearly that we will apply the submitted fees to cover the claims/sites listed IN THE ORDER THAT THE OWNER LISTED THEM ON HIS/HER DOCUMENT(s),

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4/ The complete text of this regulation provides:

"(m) 'Filed or file' means being received and date stamped by the pro-per BLM office. For the purpose of complying with § 3833.2-1 [not applicable here] of this title, "timely filed" means being filed within the time period prescribed by law, or received on January 19th after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. This 20 day period does not apply to a notice of location filed pursuant to § 3833.1-2 of this title. (See § 1821.2-2(e) of this title where the last day falls on a date the office is closed.)" (Emphasis added.)

5/ Paragraph (c) states that BLM will accept as filed within the time named in paragraph (a) all applications to enter which were deposited in the mails within 10 days from the date of execution. Paragraph (a) states that BLM will reject all applications to make entry which are executed more than 10 days prior to filing. Each of these provisions is immaterial here because no application to enter has been filed by appellants.

> and that failure to submit the remaining required fees will cause the Bureau to void or cancel the claims/sites remaining at the end of the list. This will place the burden of selection upon the claimant and avoid us being deemed to be "arbitrary or capricious" in our handling of the matter.

The effect of this policy change is to protect certain of appellants' claims that under the BLM decision were held to be void. We hereby set aside that part of the decision that held all of appellants' claims void and direct BLM to re-examine the consequences of appellants' deficient payment.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Arizona State Office is affirmed in part, set aside in part, and remanded.

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Gail M. Frazier
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge